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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1285

ROBERT LYNN MARTIN and MAURICE DANIEL DODSON,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION

For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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UNITED STATES OF AMERICA.

PETITION

For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on January 25, 1968.

OPINIONS BELOW.

The opinion of the Court of Appeals is not reported at the time of the printing of this petition. Said opinion is printed as Appendix A, *infra*. The opinion of the Court of Appeals denying the petitions for rehearing, but modifying its original opinion is printed herein as Appendix B, *infra*.

JURISDICTION.

The judgments of the Court of Appeals (Appendix C, *infra*) were entered on January 25, 1968. Timely petitions for rehearing were denied on March 5, 1968 (Appendix B,

infra). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

I. Whether Congress has the power under the Commerce clause to prohibit all interstate transmission of wagers, by means of non-governmental facilities, regardless of the lawfulness of the wager in the States where transmitted and received.

II. Whether Congress has acted validly in making it a federal felony to transmit by wire a wager on a sporting event from Texas to Nevada, where acceptance of the wager comports with Nevada law and transmission of such wager from Texas to Nevada is either (a) not in violation of Texas law or (b) at most, an offense punishable by a fine of Five Dollars ($5.00) to One Hundred Dollars ($100.00) under Texas law.

STATUTES INVOLVED.

18 U. S. C., § 1084 (a) (b):

> **"Transmission of wagering information; penalties.**
>
> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> (b) Nothing in this Section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of

sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal."

Tex. Rev. Civ. Stat. Ann. Art. 646 (1952):

"No person in this State shall enter into an agreement with another, either orally, written or implied, whereby either one or both shall bet or wager money or anything of value, or otherwise become a party to any gambling scheme based upon the final result or outcome of any play or portion thereof of a game of baseball or football."

STATEMENT.

Petitioners were convicted in the United States District Court for the Southern District of Texas, Houston Division, on May 26, 1966 of violating 18 U. S. C., Section 1084 (R. 107-109).[1]

Each petitioner received a two year suspended sentence of imprisonment, but was placed on five years probation and fined Ten Thousand Dollars ($10,000.00) (R. 8, 108).

The charge against petitioners was the transmission of wagers and wagering information by telephone between Houston, Texas and Las Vegas, Nevada (R. 10-16). In pre-trial motions, petitioners unsuccessfully challenged the constitutionality of 18 U. S. C., Section 1084, as applied to the circumstances of this case (R. 4, 5, 17, 24). The trial Court permitted the defense to admit the facts charged while preserving for appeal the constitutional issues raised (R. 102-107). Petitioners waived trial by jury and stipulated with the government that the factual allegations of Count III of the indictment were true (R.

[1] The citation "R." refers to the certified record filed in this Court.

99-107).[2] It was also stipulated by the parties that all of the telephone calls upon which the count was predicated were made from Houston **to** Las Vegas (R. 106). Following conviction upon the stipulated record, petitioners unsuccessfully moved for entry of judgment of acquittal on the ground that the conduct alleged did not constitute an offense against the United States, because 18 U. S. C., Section 1084, could not be applied to wagers and wagering information transmitted **into** Nevada without infringing upon the powers reserved to Nevada by the Tenth Amendment to the United States Constitution (R. 109-113).

The Fifth Circuit Court of Appeals granted petitioner Martin's motion to hold the appeal in abeyance pending this Court's decision upon his petition for certiorari, which was sought prior to judgment in the Court of Appeals. Martin's petition of certiorari urged that certiorari be granted for the reason that his sole point of appeal turned upon a constitutional issue then before this Court in **United States v. Fabrizio**, 385 U. S. 263 (1966). The government opposed Martin's petition on the grounds that the case was not of such public importance to justify deviation from normal appellate procedure and that **Fabrizio** did not concern the constitutional issue raised by Martin. The government did not urge that Congress has the power to prohibit all interstate transmission of wagers regardless of the lawfulness of the wager in the States where transmitted and received. Certiorari was denied. 385 U. S. 1008.

The Court of Appeals for the Fifth Circuit affirmed the judgments, holding that the power of Congress under the commerce clause "clearly extends to an absolute prohibition regardless of State public policy, **Champion v. Ames**, 1903, 188 U. S. 321 . . . [and Congress] also has

[2] The remaining counts were dismissed on motion by the government.

the power to prohibit all interstate transmission of wagers" (App. A, *infra*, p. A-8).

The Court of Appeals, assuming that the instant wagers were made in Nevada, indicated that the resolution of the question of whether Texas law was violated was not necessary for affirmance of the convictions in this case. The Court did state, however, that since the Texas statute prohibits "wagering by a 'person in this state'", the petitioners were guilty of an offense punishable by a fine of $5 to $100 under Texas law (App. B, *infra*, p. A-11). Among the reasons for its conclusion that Texas law was violated, the Court of Appeals stated that since petitioners did not contend that they came within the exception of Section 1084 (b) for transmission of "bets", they could not validly claim that Texas law was not violated (App. A, *infra*, p. A-5). The Court of Appeals subsequently deleted this reason given in its original opinion after it was brought to the Court's attention by petitioners' petition for rehearing that it had apparently misconstrued the provisions set forth in 18 U. S. C., § 1084 (b). Section 1084 (b) excepts transmission of **information** assisting in the placing of bets or wagers, but does not except transmission of **bets**. Petitioners had stipulated at trial that they transmitted **bets** and **information** and therefore could not argue that they came within the exception.

REASONS FOR GRANTING THE WRIT.

I.

Nevada's legislation and promotion of many forms of gambling is well known,[3] but in this case its policy is negated by the commerce power legislation (18 U. S. C., § 1084) passed under the rubric of "assisting" the states. Thus, the question presented is: "Whether Congress has

[3] (App. A, *infra*, p. A-4).

the power under the commerce clause to prohibit all interstate transmission of wagers, by means of non-governmental facilities, regardless of the lawfulness of the wager in the States where transmitted and received." The Court of Appeals held that the power of Congress under the Commerce clause "clearly extends to an absolute prohibition regardless of state public policy, **Champion v. Ames**, 1903, 188 U. S. 321 . . . [and Congress] also has the power to prohibit **all** interstate transmission of wagers." (App. A, *infra*, p. A-8). Therefore, this case presents for determination the important question of whether Congress has the absolute power to prohibit all interstate transmission of wagers regardless of lawfulness of the wager.

The statute under which petitioners were indicted and convicted, 18 U. S. C., § 1084, prohibits use of interstate commerce facilities for certain gambling transactions. Section 1084 forbids anyone in the business of betting and wagering from knowingly using a wire communication facility for interstate transmission of bets and wagers, or information assisting in the placing of bets and wagers. Section 1084 was "part of a single legislative 'package'" containing "a series of anti-gambling bills sponsored by the Department of Justice." See Brief for the United States, **United States v. Fabrizio**, 385 U. S. 263 (1966), pp. 11-12, 15 and n. 9. The motivation behind passage of 18 U. S. C., § 1084 was anti-gambling. Yet, the constitutional authority for the enactment of Section 1084 was the commerce clause, and the bill was justified by Congress as filling a professed need "to assist the various states and the District of Columbia in the enforcement of **their** laws pertaining to gambling, bookmaking and like offenses." See S. Rep. No. 588, 87th Cong., 1st Sess., p. 2; H. Rep. No. 967, 87th Cong., 1st Sess., p. 2 (emphasis added).

The reason for such justification by Congress of this legislative enactment seems clear. This Court had earlier up-

held commerce clause legislation affecting matters subject to the State police power when such laws aided the States by making it "impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce." **Clark Distilling Co. v. Western Md. R. Co.**, 242 U. S. 311, 331 (1917). **Clark** is central in the cases dealing with the importation and sale of liquor within the various states. These cases,[4] like the cases prohibiting the transportation of lottery tickets in interstate commerce, turn on the theory that federal legislation was necessary to prevent one state from "preying" on another through the facilities of interstate commerce (See Brief for United States, **United States v. Fabrizio**, p. 10).

In this case, the Court of Appeals held that Congress had "the power to prohibit **all** interstate transmission of wagers . . . regardless of state public policy . . ." (App. A, *infra*, p. A-8). Thus, the Court of Appeals decision is in conflict with this Court's holding in **United States v. Kahriger**, 345 U. S. 22 (1953) that there is a constitutional barrier against federal regulation of state gambling policy. In **Kahriger** a federal tax requiring the registration of people engaged in the gambling business was upheld because this Court found a legitimate revenue-collecting aim and result. But had the majority agreed with Mr. Justice Frankfurter and Mr. Justice Douglas that the major purpose of the tax was "to grapple directly with gambling in the states," 345 U. S. at 40, the measure would clearly have been struck down.[5] Mr. Justice Jackson, though concurring with the majority, noted that gambling is a local concern and "professional gambling continues to survive because a large and influential part

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[4] See Leisy v. Hardin, 135 U. S. 100 (1890); **In re Rahrer**, 140 U. S. 545, 561 (1891); **Champion v. Ames**, 188 U. S. 321 (1903) (Lottery case).

[5] This Court recently reversed the majority opinion in **Kahriger**, but on Fifth Amendment grounds. **Marchetti v. United States**, 88 S. Ct. 697 (1968).

of our population patronizes and protects it." 345 U. S. at 35.

The constitutional argument here was also urged in **United States v. Frankfort Distilleries, Inc.**, 324 U. S. 293 (1945). In that case a Sherman Act conviction of producers and distributors who controlled liquor prices in Colorado was reversed by the Tenth Circuit because all the sales were within Colorado, and there was no basis for invocation of the federal legislation. Reversing the Court of Appeals, this Court held that the means used to control prices reached beyond the boundaries of Colorado, and that the scheme was dependent for its success upon activity affecting commerce. The defense argued, however, that the charged combinations were condoned by Colorado's fair trade laws. This Court specifically found that Colorado did not approve such activity and that this therefore was not a case in which the commerce power "is applied to defeat the policy of the State." "That", said the Court, "would raise questions of moment which need not be decided until they are presented". 324 U. S. at 299. This case squarely presents such issue. The constitutional validity of the use of the commerce power to defeat, rather than to assist, State policy lies at the heart of the instant case, and this Court should review this conviction so that a definitive ruling on this question may result.

II.

The Court of Appeals misconstrued Texas law when it stated that **petitioners** violated Texas law even though the wager was admittedly made in Nevada and petitioners were not within the borders of Texas. This misinterpretation of Texas law by the Court of Appeals caused that Court to consider the constitutional questions raised by petitioners in an improper light, to the prejudice of petitioners.

As stated, petitioners stipulated in the District Court that they were engaged in the business of betting and wagering in Las Vegas, Nevada, and that they accepted football wagers in Las Vegas **from** bettors who telephoned from Houston, Texas (R. 172). Nevada, where the wagers were made,[6] prohibits neither wagering on football games nor the dissemination of information assisting in such wagering. Texas does not bar wagers concluded out of the State of Texas, nor does it prohibit receipt or distribution of information assisting in placing of bets and wagers.[7]

Although holding that it made no difference whether Texas law was violated by petitioners, the Court of Appeals stated that the conduct of petitioners was an offense (punishable by a fine of $5 to $100) under Texas law even though the **wager was admittedly made in Nevada** and **petitioners were not within the borders of Texas** (App. B, *infra*, p. A-11).

The Texas Supreme Court recently upheld earlier decisions that Texas applies a different standard in determining the legality or illegality of conduct when a wager is placed outside the borders of Texas. **Alberto Castilleja v. Severa Camero**, 10 Tex. Sup. Ct. J. 340 (1967).

In **Castilleja**, the plaintiff and defendant's parents, who were residents of Texas, agreed to jointly purchase a lottery ticket in the Mexican National Lottery. This agreement was made within the borders of Texas. The defendant's parents bought the lottery ticket in Mexico,

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[6] The Court of Appeals assumed as correct petitioners' contention that wagers are considered to be contracts and that the instant wagers "were made in Nevada, not Texas" (App. A, *infra*, pp. A-4-5).

[7] Title II, Texas Stat. Ann., Art. 646, provides:

"No person **in this state** shall enter into an agreement . . . whereby either one or both shall bet or wager money . . . upon . . . a game of baseball or football" (emphasis added).

and the ticket subsequently was declared the winning ticket. The defendant collected the money, but refused to pay plaintiff his share, contending that the transaction was illegal under a Texas statute forbidding the establishment or operation of a lottery or the sale of lottery tickets in Texas. The Texas Supreme Court upheld the lower Court's judgment in favor of the plaintiff, holding that the contract was not illegal under Texas law for the reason that the agreement was to do a lawful thing, *i. e.*, to participate in a Mexican lottery. 10 Tex. S. Ct. J. at 341. The Court reasoned that Texas law is concerned only with events taking place within its borders and when another sovereign is involved, a different standard is applied.

The Fifth Circuit has similarly held in **Jacob v. Hyman,** 5 Cir., 286 Fed. 346 (1923), that Texas law is concerned only with events taking place in Texas. **Jacob** involved the enforcement of claims arising from dealing in cotton futures. There, a Texas resident sent a telegram from Texas to the New Orleans, La. futures exchange. Under Texas law the contract involved was "a wagering contract, the enforcement of which was contrary to the public policy of the state of Texas, and invalid and unenforceable in the courts sitting in Texas." 286 Fed. at 348. The Fifth Circuit held, however, that the contract was legal in New Orleans and therefore was enforceable by a federal court sitting in Texas.

Here, the Court of Appeals did not refer to the **Castilleja** and **Jacob** cases in its original opinion, but upon petition for rehearing modified its opinion, holding that the two decisions were inapplicable. The Court stated that neither case involved conduct which was illegal under Texas law, and that here, petitioners' conduct was clearly unlawful (App. B, *infra,* p. A-11).

Jacob and **Castilleja** strongly support petitioners' contention that Texas does not bar wagers concluded out

of the state, nor does it prohibit receipt or distribution of information assisting in the placing of bets and wagers. Thus, here, gambling activity endorsed by one State (Nevada) and only incidentally connected with another State (Texas), which does not itself prohibit the activity, is transformed into a federal felony punishable by imprisonment and heavy fines.[8]

As stated, Section 1084 was enacted "to assist the various states . . . in the enforcement of **their** laws pertaining to gambling, bookmaking and like offenses" (See p. 6, *supra*). In this circumstance, application of the federal statute to supersede the policy of one State (Nevada) without assisting the law enforcement of another State (Texas) is of doubtful constitutionality. **Clark Distilling Co. v. Western Md. Rd. Co.**, 242 U. S. 311, 331; **United States v. Frankfort Distilleries, Inc.**, 324 U. S. 293. Congress lacks the constitutional power to subordinate Nevada's basic economic and moral policy to what is at most a marginal concern to Texas.

In addition, if the decision by the Court of Appeals means that the application of Section 1084 depends upon whether Texas law was violated and that Section 1084 would not otherwise apply, then the federal statute remains unconstitutional. The reason is that the statute exhibits an intent to prohibit and to punish violations of State law, thereupon invading the police power, inherent in the states. **United States v. Constantine**, 296 U. S. 287, affirming 75 F. 2d 928 (5 Cir.).

In **Constantine**, a federal statute imposed a special excise tax of $1,000.00 on persons carrying on liquor

[8] Assuming that the Court of Appeals was right in stating that petitioners violated Texas law, said offense is punishable only by a fine of $5 to $100 under Texas law. Thus, the lightness of the penalty and the decisions in **Castilleja** and **Jacob** indicate how marginal Texas' concern is with a situation such as here presented.

business contrary to the laws of his state. This Court, affirming the Fifth Circuit Court's decision, held that the validity of the Statute should be decided on the following grounds:

"The question is whether the exaction of $1,000.00 in addition, by reason solely of his violation of State law, is a tax or a penalty." 296 U. S. at 294.

This Court held that the exaction of $1,000.00 was a penalty and therefore "beyond the limits of federal power." 296 U. S. at 294.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

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APPENDIX.

APPENDIX A.

In the
United States Court of Appeals
For the Fifth Circuit

No. 23828

Robert Lynn Martin and Maurice Daniel Dodson,
Appellants,
versus
United States of America,
Appellee.

Appeals from the United States District Court for the Southern District of Texas.

(January 25, 1968.)

Before Jones, Wisdom and Dyer, Circuit Judges.

Wisdom, Circuit Judge: The narrow question for review is the constitutionality of the Federal Anti-Wagering Law, 18 U. S. C. § 1084,[1] as applied in the circumstances of this case.

[1] 18 U. S. C., § 1084:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

The appellants were convicted for transmitting wagers and wagering information by telephone in interstate commerce—between Houston, Texas and Las Vegas, Nevada. They waived trial by jury and stipulated with government counsel that the factual allegations of Count 3[2] of the indictment were true. It was also stipulated that all of the telephone calls upon which the Count was predicated were made *from* Houston *to* Las Vegas. The appellants were convicted upon the stipulated record and appealed to this Court[3] on the sole issue of the constitutionality of section 1084. We find that section constitutional as applied to the transmission of wagers from Texas to Nevada and thus affirm the judgment of the district court.

* * * * * * * *

This is not the first constitutional attack on section 1084. Without exception, however, the attack has failed. Section 1084 is (1) within the scope of Congressional power under the commerce clause (*United States v. Kelley*, S. D. N. Y. 1966, 254 F. Supp. 9; *United States v. Borgese*, S. D. N. Y. 1964, 235 F. Supp. 286); (2) not contrary to

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[2] "That from on or about September 20, 1963, and continuously thereafter until on or about January 1, 1965, MAURICE DANIEL DODSON and ROBERT LYNN MARTIN, the defendants, being then and there engaged in the business of betting and wagering, did knowingly use a wire communication facility, that is, the telephone, and did knowingly and wilfully aid, abet, counsel, command, induce, procure and cause the use of a wire communication facility, that is, the telephone, for the transmission in interstate commerce between Las Vegas, Nevada, and Houston, Texas, in the Houston Division of the Southern District of Texas, of bets and wagers on sporting events and contests, that is, football games, and of information assisting in the placing of bets and wagers on sporting events and contests, that is, football games."

[3] Appellant Martin petitioned for certiorari following his motion in this Court to hold his appeal in abeyance. His petition asserted that his sole point of appeal turned upon a constitutional issue before the Supreme Court in United States v. Fabrizio, subsequently decided, 1966, ... U. S. ..., 87 S. Ct. 457, 17 L. Ed. 351. Certiorari was denied, 87 S. Ct. 715. As we suggest below, *Fabrizio* strongly supports the result here reached, although different violations of different sections were involved.

the First Amendment (*United States v. Kelley; United States v. Borgese; United States v. Smith*, E. D. Ill. 1962, 209 F. Supp. 907); (3) not void for vagueness (*United States v. Borgese; United States v. Smith*); and (4) not in derrogation of the police power reserved to the states through the Tenth Amendment (*United States v. Kelley; United States v. Borgese*). It has been held constitutional even when applied to transmission of wagers between two points in the same state when the transmission crosses state borders. *United States v. Yaquinta*, N. D. W. Va. 1962, 204 F. Supp. 276. In the most recent case involving interpretation of section 1084, its constitutionality was not even challenged. *Sagansky v. United States*, 1 Cir. 1966, 358 F. 2d 195. Furthermore, section 1952, a complementary enactment prohibiting travel or transportation in aid of racketeering enterprises, uniformly has been upheld throughout various constitutional attacks.[4]

We are here presented with a new thrust: The appellants argue that since they were convicted for transmitting wagers to Nevada, where such wagering is legal, section 1083 is unconstitutionally being applied "to defeat the policies of Nevada while not aiding the enforcement of the laws of any other State." We find that the contentions upon which this constitutional argument is based are erroneous, misleading, and irrelevant.

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[4] Section 1952 has been held (1) within the scope of Congress' power under the commerce clause, Marshall v. United States, 9 Cir. 1966, 355 F. 2d 999; United States v. Zizzo, 7 Cir. 1964, 338 F. 2d 577; United States v. Ryan, D. Colo. 1963, 213 F. Supp. 763; (2) not void for vagueness or otherwise violative of due process; Turf Center, Inc. v. United States, 9 Cir. 1963, 325 F. 2d 793; Bass v. United States, 8 Cir. 1963, 324 F. 2d 168; United States v. Teemer, N. D. W. Va. 1963, 214 F. Supp. 952; United States v. Ryan, supra; United States v. Barrow, 3 Cir. 1966, 363 F. 2d 62; and (3) not in derrogation of the police power reserved to the states through the Tenth Amendment, United States v. Barrow, supra; Marshall v. United States, supra; United States v. Ryan, supra.

I.

There is no denying that Nevada favors legal gambling of almost any kind; gambling represents perhaps its most obvious and pervasive state-fostered institution.

> "Nevada's principal industry, we say is tourism. The tourists come for many reasons to the State of Nevada. . . . Now it would be less than candid to say a great many people do not come into our State because we have some forms of legal gambling that other states do not have. . . . It is a way of life." Statement of Governor Grant Sawyer, of Nevada, on NBC Television "White Paper", Sept. 6, 1966.

Strictly speaking, therefore, any denial of the channels of interstate commerce into or out of Nevada to the wagering world can be considered contrary to the policy of that state.

The appellants' argument assumes that application of section 1084 in this case does not aid the enforcement of the laws of Texas. The relevant Texas statute provides:

> No person in this State shall enter into an agreement with another, either orally, written or implied, whereby either one or both shall bet or wager money or anything of value, or otherwise become a party to any gambling scheme based upon the final result or outcome of any play or portion thereof of a game of baseball or football. Tex. Rev. Civ. Stat. Ann. art. 646 (1952).

The appellants suggest that this statute apparently would be inapplicable to wagers not concluded in Texas and, since wagers are contracts, *United States v. Calamaro,* 1957, 354 U. S. 351, 355, and a contract is made where accepted, the wagers in question were made in Nevada, not Texas. Corbin, Contracts § 79 (1952). Although this

logical progression itself may be open to question, we may even assume its validity and yet arrive at a result contrary to that propounded by the appellants. For the Texas statute refers to wagering by a "person in this State"; had the legislature desired the construction asserted by the appellants, the article would have been written to prohibit entering "into an agreement in this State".[5]

The weakness in the appellants' argument is emphasized by the fact that they do not suggest that this case falls within the exception in section 1084 (b) for transmission of bets "from a State where betting on that sporting event or contest is legal into a State in which such betting is legal." In other words, the appellants seem to say that Texas does not prohibit such wagering as was here involved, while at the same time they assume that such wagering is not legal in Texas. Surely application of section 1084 in this case does aid Texas in the enforcement of its laws and in the implementation of its policies.

II.

Reference to Nevada's policies in the context of enforcement of this section is, moreover, misleading. For it is clear that if the policy of Nevada is not "defeated" in some way, then the policy of every other state that prohibits what Nevada allows could be defeated. As Senator Morrill pointed out in the debate on the 1876 anti-lottery statute:

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[5] Tex. Rev. Civ. Stat. Ann., arts. 646a and 468 make it illegal to bet on dog races or horse races held in Texas or *elsewhere*. The appellants argue from this that Texas meant to distinguish between betting on races held out of state and betting on football or baseball games held out of state. This conclusion is erroneous because (1) article 646 is neither patently nor latently ambiguous, and thus there is no need to resort to in pari materia constructions, and (2) the various Texas anti-wagering statutes and anti-gaming statutes reflect a strong state policy opposing participation in such activities by persons at the time located within the boundaries of the state.

> [I]t is obvious that if thirty-six States were to make the most penal statutes against lotteries, and the mails were open to one that allowed lotteries, the laws of the thirty-six States would be rendered nugatory, because all the people of the thirty-six States could obtain their tickets from this one State as well as though they were authorized from the whole. Therefore if the matter is allowed to run through the mails, any laws by any State against lottery tickets are entirely valueless.

Furthermore, assistance to the states directly[6] was only part of the reason for enactment of section 1084. This section was part of an omnibus crime bill that recognized the need for independent federal action to combat interstate gambling operations.[7] Other sections prohibited in-

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[6] "The purpose of this legislation is to assist the various States, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of or the leasing, furnishing, or maintaining of wire communication facilities which are or will be used for the transmission of certain gambling information in interstate and foreign commerce." Letter from Attorney General Robert F. Kennedy to Speaker of the House of Representatives, April 6, 1961, 2 U. S. Code & Congr. News, 87th Congr., 1st Sess., p. 2631, 2633. See also The Attorney General's Program to Curb Organized Crime and Racketeering, Hearings, Sen. Comm. on the Judiciary, 87th Congr., 1st Sess. on S. 1653, etc.; Legislation Relating to Organized Crime, Hearings, Subcommittee No. 5 of the House Comm. on the Judiciary, 87th Congr., 1st Sess. on H. R. 468, etc.

[7] Section 1084 was one of a series of bills designed to form a unified federal statutory attack on organized racketeering. The Kefauver crime hearings of 1950 and 1951 had brought to national attention the vast scope and power of racketeers who carried on their activities throughout the United States on a highly organized, interstate basis. Hearings Before a Senate Special Committee to Investigate Organized Crime in Interstate Commerce, 81st Congr., 2d Sess. 1950, 1951. These hearings and the investigations that followed constituted the evidentiary background for the Congressional hearings of 1961, cited in note 6, supra, which resulted in the passage of section 1084. See generally

terstate transportation of gambling paraphernalia, 18 U. S. C. § 1953, interstate transportation of gambling machines, 15 U. S. C. § 1171, and interstate travel in aid of racketeering, 18 U. S. C. § 1952. Moreover, this series of legislation does not stand alone, but appears as part of an independent federal policy aimed at those who would, in furtherance of any gambling activity, employ any means within direct federal control.[8]

III.

The appellants' reference to state policy constitutes a challenge to Congressional power under the commerce clause to enact legislation that may contravene Nevada policy. It is in this constitutional context that reference to state policy becomes irrelevant.

The power of Congress under the commerce clause has been amply and ably discussed in legal literature.[9] That

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Johnson, Organized Crime: Challenge to the American Legal System, 53 Crim. L., C. & P. S. 399 (1962), 54 Crim. L., C. & P. S. 1 (1963). See also Ezell, Fortune's Merry Wheel (1960).

[8] See, e. g., 15 U. S. C., §§ 1081-83 (prohibiting gambling on ships or airplanes owned by American citizens in areas of federal jurisdiction); 15 U. S. C., §§ 1173-78 (requiring registration of manufacturers and dealers of gambling devices); 18 U. S. C., §§ 1301-03 and 19 U. S. C., § 1305 (prohibiting, importing, transporting, or mailing lottery tickets and related matter); 18 U. S. C., § 1304 (prohibiting broadcasting of lottery information); 26 U. S. C., § 5723 (c) (prohibiting lottery material in packaged tobacco, cigars, or cigarettes); and Pub. L. No. 90-203, § 5136 (Dec. 15, 1967) (prohibiting banks from fostering or participating in gambling activities. Cf. New York Times, Dec. 24, 1967, § 1, at 48, col. 4 (city ed.), where an executive director of a Las Vegas casino association called a hostile tax ruling "another phase of the Federal Government's continuing attack on Nevada gambling".

[9] E. g., 1 Schwartz, The Powers of Government 222 (1963); Corwin, Congress's Power to Prohibit Commerce—A Crucial Constitutional Issue, 18 Cornell L. Q. 477 (1933); Cushman, National Police Power Under the Commerce Clause, 3 Minn. L. Rev. 289, 381, 452 (1919); Parkinson, Congressional Prohibitions of

power clearly extends to an absolute prohibition regardless of state public policy, *Champion v. Ames,* 1903, 188 U. S. 321, 23 S. Ct. 321, 47 L. Ed. 492, just as it does to an absolute absence of regulation, *Brown v. Houston,* 1885, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257. Congress has exercised that power to regulate—or prohibit, as the case may be—transportation of various articles, transmissions of various sorts, and travel of persons for various purposes in interstate commerce.[10] These regulations and prohibitions have been uniformly upheld.

Just as Congress has the power to prohibit all interstate shipments of intoxicants, *Clark Distilling Co. v. Western Md. Ry.,* 242 U. S. 311, 37 S. Ct. 180, 61 L. Ed. 326, it also has the power to prohibit *all* interstate transmission of wagers. It cannot follow, therefore, that Congress does not have the power to prohibit *some* interstate transmission of wagers. *Clark Distilling Co. v. Western Md. Ry., supra.* In *United States v. Fabrizio,* 1966, ... U. S. ..., 87 S. Ct. ..., 17 L. Ed. 2d 351, the Supreme Court upheld section 1953 as applied to paraphernalia related to a legal lottery, specifically, the state-run New Hampshire lottery. Despite New Hampshire's efforts, as amicus, to have the statute limited only to *illegal* lotteries, the Court recognized that this limitation would defeat one of the principal purposes of the section in that it would al-

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Interstate Commerce, 16 Colum. L. Rev. 367 (1916); Sutherland, Is Congress a Conservator of the Public Morals?, 38 Am. L. Rev. 194 (1904); Whitney, The Latest Development of the Interstate Commerce Power, 1 Mich. L. Rev. 615 (1903); Comment, Regulation of Gambling Devices in Interstate Commerce, 4 DePaul L. Rev. 256 (1955); Note, Federal Control Over Crimes—Scope of Power to Regulate Crime Under the Commerce Power, 32 Mich. L. Rev. 378 (1934). See also Stern, The Commerce Clause and the National Economy, 1933-1946, 59 Harv. L. Rev. 645, 947 (1946).

[10] See, e. g., the statutes collected in Note, Federal Control Over Crimes, supra, note 9 at 355-56, n. 28, and in Kauper, Constitutional Law—Cases and Materials 157-58 (1960).

low New Hampshire lottery acknowledgments to pass freely into states with local laws against lottery. 17 L. Ed. 2d at 357.[11] Surely this decision is in many ways in derrogation of New Hampshire's policy to promote its lottery.[12] Similarly, of course, the repercussion in states with no (or a low) minimum wages and hours laws did not inhibit Congress from constitutionally prohibiting from interstate commerce material produced in nonconforming conditions. *United States v. Darby*, 1941, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609. As the Supreme Court had earlier pointed out:

> The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or states is not material to be considered. It is the supreme law of the land, and persons and states are subject to it. *Hoke v. United States*, 1913, 227 U. S. 308, 33 S. Ct. 281, 55 L. Ed. 23.

In short, Section 1084 is valid as applied to the facts of this case. The appellants' convictions must stand. The judgment of the district court is AFFIRMED.

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[11] Section 1953 contains an exception to "the transportation of betting materials to be used in the placing of bets or wagers on a sporting event *into a State in which such betting is legal* under the statutes of that State". 18 U. S. C., § 1953 (b). Section 1053 contains no such exception regarding transmission of wagers into states where such wagers are legal, thus suggesting congressional intent on this issue. Section 1084 does contain an exception for transmission between states where wagering is legal in *both* states.

[12] Approximately 87% of the winners in the 1964 New Hampshire Sweepstakes resided out of state. See 110 Cong. Rec. A5494. Winners in both the 1964 and 1965 Sweepstakes were from over 34 states, the District of Columbia, and various foreign countries. See New Hampshire Sweepstakes Comm'n, New Hampshire Sweepstakes Program 9 (1965).

APPENDIX B.

In the
United States Court of Appeals
for the Fifth Circuit.

No. 23828.

Robert Lynn Martin and Maurice Daniel Dodson,
Appellants,

versus

United States of America,
Appellee.

Appeals From the United States District Court
for the Southern District of Texas.

(March 5, 1968.)

On Petition for Rehearing.

Before Jones, Wisdom and Dyer, Circuit Judges.

Wisdom, Circuit Judge: It is Ordered that the petition for rehearing filed in the above entitled and numbered cause is hereby Denied;

It Is Further Ordered that, for clarification, the opinion issued on January 25, 1968, be modified as follows:

The entire paragraph at the top of page 6 of the slip opinion, beginning "The weakness in . . . ." and end-

ing "implementation of its policies" shall be deleted. Also, the following shall be added to footnote 5: The appellant's reliance on Jacob v. Hyman, 5 Cir. 1923, 286 Fed. 346, and Castilleja v. Camero, Tex. 1967, 414 S. W. 2d 424, is misplaced. *Jacob* involved a suit to enforce a contract made outside Texas (and legal where made) by a Texas resident, where under Texas law the contract was "a wagering contract, the enforcement of which was contrary to the public policy of the state of Texas, and invalid and unenforceable in the courts sitting in Texas." 286 Fed. at 348. *Castilleja* involved a suit to enforce an agreement concerning distribution of the proceeds from a lottery prize, the establishment of a lottery or the sale of a lottery ticket being unlawful under Tex. Rev. Pen. Code Ann. art. 654. The plaintiffs recovered in both cases. But neither case involved conduct by the plaintiffs which was itself illegal under Texas law. Here article 646 provides clearly that the appellants' conduct was unlawful.

APPENDIX C.

United States Court of Appeals
for the Fifth Circuit.

October Term, 1967.

No. 23828.

D. C. Docket No. 65-H-167, Criminal Action.

Robert Lynn Martin and Maurice Daniel Dodson,
Appellants,

versus

United States of America,
Appellee.

Appeals from the United States District Court
for the Southern District of Texas.

Before Jones, Wisdom and Dyer, Circuit Judges.

Judgment.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 25, 1968.

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No. 1285

In the Supreme Court of the United States

OCTOBER TERM, 1967

ROBERT LYNN MARTIN and MAURICE DANIEL DODSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
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BEATRICE ROSENBERG,
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ROBERT LYNN MARTIN and MAURICE DANIEL DODSON,
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted in a trial to the United States District Court for the Southern District of Texas of using the facilities of interstate commerce for the transmission of wagers, and information assisting in the placing of such wagers, in violation of 18 U.S.C. 1084. On May 29, 1966, each petitioner received a two-year suspended sentence, a $10,000 fine, and probation for five years. Petitioner Martin's petition for a writ of certiorari prior to judg-

ment of the court of appeals was denied by this Court. *Martin* v. *United States*, 385 U.S. 1008. The court of appeals subsequently affirmed the convictions (Pet. Apps. A, B).

The evidence, as stipulated by the parties (R. 14, 104-107), and not challenged here, showed that petitioners engaged in the interstate transmission of bets and wagers on football games, and information assisting in placing those wagers, by telephone, from Houston, Texas, to Las Vegas, Nevada.

There is no occasion to review the question presented by petitioners—"Whether Congress has the power under the commerce clause to prohibit all interstate transmission of wagers, by means of non-governmental facilities, regardless of the lawfulness of the wager in the States where transmitted and received" (Pet. 2). Contrary to petitioners' assumption, Texas law contains a clear and unequivocal prohibition against the type of activity involved in this case. The relevant statute provides:

> No person in this State shall enter into an agreement with another, either orally, written or implied, whereby either one or both shall bet or wager money or anything of value, or otherwise become a party to any gambling scheme based upon the final result or outcome of any play or portion thereof of a game of baseball or football. * * * [Tex. Rev. Pen. Code Ann. art. 646 (1952).]

Petitioners cannot escape the reach of this statutory policy by the argument, based on contract law (see Corbin, Contracts § 79 (1963)), that the wager was

not complete until accepted in Las Vegas (Pet. 9-11). The Texas statute also prohibits any person from becoming "* * * a party to any gambling scheme based upon the final result or outcome of any play or portion thereof of a game of baseball or football"—the very activity conducted by these petitioners.[1] Even under the test which petitioners propose (Pet. 11), Section 1084 may constitutionally be applied in this case because the federal statute assists the State of Texas in enforcing its policy against the gambling business by punishing those who, like petitioners, use interstate communication facilities to subvert that policy.

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[1] The Texas policy is not diminished by the fact that a Texas civil court would enforce an agreement made in Texas to purchase a Mexican Lottery ticket and divide the winnings, *Castilleja* v. *Camero*, 414 S.W. 2d 424 (Tex. Sup. Ct.), or by the fact that a federal district court, sitting in Texas, would enforce a futures contract, valid where made (Louisiana), *Jacobs* v. *Hyman*, 286 Fed. 346 (C.A. 5). In *Castilleja*, there was no Texas policy against entering into an agreement to purchase a lottery ticket in Mexico; the only relevant statute prohibited the establishment of a lottery and the sale of lottery tickets within the State. Tex. Rev. Pen. Code Ann. art. 654. In *Jacobs*, the court under general principles of comity and full faith and credit, enforced a contract which was valid where made and which did not involve conduct that was illegal under Texas law.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

MAY 1968.

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